Supreme Court, U.S.
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No. 09-1404

IN THE

Supreme Court of the United States

TEAMSTERS, LOCAL UNION NO. 523, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD AND KIRK RAMMAGE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT KIRK RAMMAGE'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a labor union violate 29 U.S.C. §§ 158(b)(1)(A) and (2) by discriminating against employees in bargaining because they formerly were not represented by the union?

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STATEMENT OF THE CASE

Respondent Kirk Rammage is an employee of Interstate Brands Corp. ("Interstate" or "Employer"). Interstate had employees working for two different product brands, Dolly Madison and Wonder Bread/ Hostess. Teamsters, Local Union No. 523 ("Union" or "Petitioner") represented both Dolly Madison and Wonder Bread/Hostess employees in separate bargaining units, with separate collective bargaining

agreements. Rammage, who had been employed by Interstate for approximately fifteen (15) years as a route salesman for Dolly Madison products, was neither in a bargaining unit represented by a union nor a union member. Rammage had been employed by the company longer than any other sales agent working in its facility in Ponca City, Oklahoma. (Pet. App. 8a-9a.)

In November 2005, the Employer, in an agreement with the Union, merged all Dolly Madison and Wonder Bread/Hostess employees into a single bargaining unit. Both parties agreed to dovetail (merge) the seniority lists of Dolly Madison and Wonder Bread/ Hostess employees. The Employer, which considered Rammage its best Ponca City employee, sought to have his seniority dovetailed like all other merged unit employees. The Union, however, after agreeing to the merged seniority system, learned that Rammage had previously been an unrepresented employee. Although the Union agreed that he should be placed in the merged unit, it objected to his seniority being dovetailed into a Wonder Bread/ Hostess unit. Instead, it insisted that Rammage be endtailed (i.e., put at the bottom of the seniority list). The Employer not only acquiesced to the Union's demand that Rammage be endtailed, it also notified him that he must join the Union as a condition of employment. (Pet. App. 8a-10a.)

As a result of the merger, a delivery route was eliminated and Rammage was endtailed. Because he was endtailed, he was placed at the bottom of the seniority list and bumped from his delivery route. Assigned to a new route, Rammage was required to commute more than 70 miles to a new work location. (Pet. App. 9a-10a; 17a-19a.)

The National Labor Relations Board ("NLRB" or "Board") ruled that the Employer violated Sections 8(a)(1) and (3) and the Union violated Sections 8(b)(1)(A) and (2) of the National Labor Relations Act ("NLRA"). (Pet. App. 25a-26a.) On appeal by the Union, the United States Court of Appeals for the Tenth Circuit unanimously upheld the Board's decision. (Pet. App. 13a.) The Tenth Circuit also unanimously denied the Union's petition for rehearing en banc. (Pet. App. 29a.)

REASONS FOR DENYING THE WRIT

I. THE COURT HAS ALREADY HEARD ARGUMENT ON THE QUESTION OF A TWO-MEMBER NATIONAL LABOR RELATIONS BOARD AND THAT DECISION WILL BE CONTROLLING.

The first issue raised by Petitioner Teamsters, Local Union No. 523 is the validity of the ruling by a two-Member National Labor Relations Board. In *New Process Steel, L.P. v. NLRB,* No. 08-1457 (U.S. argued Mar. 23, 2010), this Court heard arguments on the question of the validity of decisions rendered by a two-Member Board. The decision in that case is controlling. Unless this Court reverses the Seventh Circuit's *New Process Steel* decision, which upheld the authority of the two-Member Board, there is no basis for the Court to grant certiorari on that issue.

II. THE TENTH CIRCUIT DECISION DOES NOT PRESENT AN IMPORTANT AND RECURRING CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

Petitioner claims that the Tenth Circuit's decision in this case conflicts with the 1965 decision of the

United States Court of Appeals for the First Circuit in *NLRB v. Whiting Milk Corp.*, 342 F.2d 8 (1st Cir. 1965) (2-1 decision). There is no conflict, as *Whiting Milk* is distinguishable.

In *Whiting Milk*, there was a pre-existing multi-employer contract in which a union and employer agreed to dovetail the seniority of bargaining unit employees the union represented ahead of the seniority of employees in later-acquired units it did not previously represent. *Id.* at 9. In this case, in contrast, there was no pre-existing agreement. Instead, in bargaining about seniority in the newly merged unit, the Union preferred employees it previously represented over the one and only employee it now represented, but whom it had not previously represented. (Pet. App. 8a-10a, 17a-18a.) Even the First Circuit agrees that *Whiting Milk* is distinguishable in these circumstances. *See Teamsters Local Union No. 42 v. NLRB*, 825 F.2d 608, 613-14 (1st Cir. 1987).

The weakness of Petitioner's argument is underscored by its own admission that the Tenth Circuit's decision fails to even mention *Whiting Milk*. (Pet. at 8.) Clearly, the Tenth Circuit did not observe any conflict among the circuits.

Even if, *arguendo*, *Whiting Milk* is not distinguishable, no compelling conflict on a matter significantly worthy of granting certiorari exists. *See* S. Ct. R. 10(a). *Whiting Milk*, decided over forty (40) years ago, is the only case Petitioner cites to support its claim of circuit conflict.

III. THE TENTH CIRCUIT'S DECISION CORRECTLY INTERPRETED THE NATIONAL LABOR RELATIONS ACT AND DOES NOT CONFLICT WITH A UNION'S DUTY OF FAIR REPRESENTATION.

The Tenth Circuit and the NLRB correctly interpreted the NLRA. Contrary to the Union's claim, their decisions did not undermine the Union's duty of fair representation.

The Union attempts to muddy the waters by claiming that it had a duty of fair representation to its previously represented employees that required it to insist on Rammage being entailed. That is false. As the Tenth Circuit pointed out, the Union abandoned any such duty when it agreed to compromise the integrity of the Wonder Bread/Hostess employees' seniority by dovetailing the Dolly Madison employees into the Wonder/Bread Hostess unit. To dovetail Rammage would have had no effect upon the integrity of the Wonder Bread/Hostess unit, because the other Dolly Madison employees' seniority was dovetailed. (Pet. App. 12a.) The Union and Employer violated the NLRA when they agreed to dovetail all route salesmen except Kirk Rammage—the only route salesman the Union agreed to represent who was not in a bargaining unit previously represented by the Union. Furthermore, the Union had no duty of fair representation to discriminate unlawfully against Rammage because he was previously unrepresented.

Lastly, the Union attempts to draw an analogy between this case and *Whiting Milk*. However, as discussed above in Section II, this case is distinguishable from *Whiting Milk*.

CONCLUSION

If this Court reverses the Seventh Circuit decision in *New Process Steel*, it should then grant certiorari here, vacate the decision of the Tenth Circuit and remand it. However, if this Court affirms the Seventh Circuit decision in *New Process Steel*, the writ of certiorari should be denied in its entirety.

Respectfully submitted,

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